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THE IMPACT OF CLERGY SEXUAL MISCONDUCT LITIGATION ON RELIGIOUS LIBERTY

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Abstract: The harm that the direct victims of clergy sexual misconduct have suffered has been the subject of extensive publicity. By contrast, the harm that the indirect victims suffer has received little attention. This Article identifies and discusses the costs—to those who belong to churches and to those who are served by churches—of using litigation to bring about compensation for victims of clergy sexual misconduct. These costs include loss of monetary resources a church would otherwise use for religious, charitable, or educational purposes; the possibility of a ministry not representative of the people it serves; decreased positive interactions between pastors and their congregants; a changed relationship between bishop and pastor in which bishop is no longer a confidant; changes in the structure of the church's hierarchy; and finally, a decreased ability for churches to participate in public life. This Article contends that using litigation to compensate victims of clergy sexual misconduct poses a threat to religious freedom. The Article concludes by recommending that churches devise a means of fairly compensating victims with as little harm to religious liberty as possible.

The religion clauses are a favorite subject of those who write and publish law review articles. Many gallons of ink have been spilled over such topics as prayer at high school football games and creches in public squares—topics that have symbolic importance, but little to do with the day-to-day ability of Americans freely to exercise religion. At the same time, relatively little has been written about one of the most serious threats to religious liberty in modern-day America—the thousands of lawsuits that have been, and will continue to be, filed against religious organizations by victims of clergy sexual misconduct.

The purpose of this Article is to describe why these lawsuits pose a threat to religious freedom. I make no attempt in this Article to ad-

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dress the many difficult constitutional and public policy questions that clergy sexual misconduct litigation raises. Rather, I seek only to describe the significant impact that this litigation has on religious liberty—an impact that must be taken into account by judges, legislators, and others when they address the constitutional and public policy questions.

I. Preliminary Comments

A few preliminary comments:

First, since 1987, I have represented or advised religious organizations in connection with over 500 clergy sexual misconduct cases in almost all fifty states and in several foreign countries. I have advised just about every major Christian denomination in the United States. I did most of this work as a practitioner, but I have continued to consult with churches since becoming a law professor in 1995. Although my work has brought me into contact with hundreds of congregations, accused pastors, and alleged victims,[1] I have worked almost exclusively on behalf of national organizations and regional "judicatories," such as dioceses and synods. To a significant extent, I have relied upon my own experience in writing this Article, both because I have as much experience with this issue as just about anyone, and because there is little reliable empirical information available.

Second, by writing only about the impact of litigation on religious liberty, I risk giving the impression that I regard this as the most important issue raised by clergy sexual misconduct—and I risk having this Article be interpreted as an apologia for pastors or churches. To be clear, not a word of this Article is meant to excuse the crimes of those pastors who sexually exploit children and vulnerable adults. Neither is a single word of this Article meant to excuse the conduct of those bishops who learn of abusive pastors and do little about them. I have spent many hundreds of hours witnessing first hand the pain

[1] For the sake of simplicity, I will refer to a member of the clergy accused of sexual misconduct as a "pastor," the entity that employs the pastor as his "congregation," the persons served by the pastor as his "congregants," and the ecclesiastical superior of the pastor as his "bishop." I will often use the word "church" to refer collectively to the religious organizations—local, regional, and national—that must defend clergy sexual misconduct lawsuits. Finally, reflecting the fact that most bishops and pastors are male, and most victims of sexual abuse female, I will use male pronouns when referring to the former and female pronouns when referring to the latter. (Although the media focus on Catholic cases involving male victims, non-Catholic pastors vastly outnumber Catholic priests, and their victims are overwhelmingly female.)

caused by clergy sexual misconduct, and many hundreds of hours being frustrated by the decisions of bishops, including some whom I advised. I know how much victims have been harmed, and I know how badly some bishops and pastors have behaved.

Finally, this Article is not an argument that victims of clergy sexual misconduct should not be compensated for their injuries. Rather, this Article is intended to identify the costs—to those who belong to churches and to those who are served by churches—of using litigation to bring about that compensation. The harm that the direct victims of clergy sexual misconduct have suffered has been the subject of extensive publicity. By contrast, the harm that the indirect victims suffer, not only on account of the misconduct, but also on account of the litigation that results from the misconduct, has received little attention. The purpose of this Article is to describe that harm.

II. The Litigation

Clergy sexual misconduct litigation imposes enormous costs on churches. Most obviously, it results in churches having to pay hundreds of millions of dollars to defend and settle lawsuits.[2] This burdens the exercise of religion, in the superficial sense that a church forced to pay money to attorneys and litigants cannot use that money to do ministry—to build churches, to buy hymnals, to pay parochial school teachers, to operate homeless shelters. To say that the litigation burdens *churches*, however, is not necessarily to say that it threatens *religious liberty*. After all, churches likely have paid millions of dollars in connection with car accidents and slip-and-falls. These costs also burden the exercise of religion in the sense that they leave churches with less money to do ministry, but few would be concerned about the impact of such litigation on religious freedom. What makes clergy sexual misconduct litigation different—what distinguishes it from car-accident litigation—is not just the enormity of the potential liability, but the fact that this liability results directly from decisions that are deeply imbued with religious significance.

Obviously, the decisions I speak of are not the decisions of abusive clergy to commit sexual misconduct. Instead, I speak of decisions made by those who end up being the codefendants of abusive pastors. These codefendants are not sued for engaging in sexual misconduct, but for making decisions that made it possible for the plaintiff to be

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[2] *See* Adam Liptak, *Scandals in the Church: The Liability*, N.Y. Times, Apr. 23, 2002, at A20.

abused (such as a decision not to remove a pastor from ministry) or for harming the plaintiff in some other way (such as by responding insensitively to a report of abuse).

In Part II.A of this Article, I describe the extent of the economic consequences of clergy sexual misconduct litigation against churches. Again, my concern here is not with the economic impact per se. Rather, my concern is that, the more serious the economic consequences of actual or threatened litigation on a religious organization, the more likely it is that the litigation will affect the decisions made by that organization. In Part II.B, I describe the nature of the claims that are brought against churches and, in particular, the extent to which these claims arise out of core religious exercise. Finally, in Part III, I describe the impact of clergy sexual misconduct on religious liberty.

A. *The Economic Impact*

Clergy sexual misconduct litigation poses a serious economic threat to all churches. Indeed, the economic survival of some churches already has been threatened. The Archdiocese of Santa Fe came within a whisker of going bankrupt on account of clergy sexual misconduct litigation,[3] and, more recently, the Archdiocese of Boston has openly discussed the possibility of filing for bankruptcy.[4] For several reasons, these lawsuits have had—and will continue to have—a major economic impact on churches.

1. Growth in Number

As recently as the early 1980s, clergy sexual misconduct litigation was almost nonexistent. Complaints of misconduct were handled privately by churches—and, in many cases, handled poorly. The result was a lot of misconduct and a lot of angry victims. The tinder was dry, waiting for a spark to light it. That spark came in 1983, with the litigation surrounding the abuse of dozens of children by Roman Catholic priest Gilbert Gauthe. Gauthe's crimes attracted a great deal of pub-

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[3] *See* David Margolick, *Sex Abuse Cases Threaten to Bankrupt an Archdiocese*, N.Y. TIMES, Dec. 22, 1993, at A1.

[4] *See* Andrew Harris, *Forgive Us Our Debts*, NAT'L L.J., Dec. 16, 2002, at 1. For an exploration of the implications of a religious organization bankruptcy filing, see generally David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181 (2003).

licity, some of his victims filed lawsuits, the lawsuits resulted in huge recoveries, and the legal world changed.[5]

Since 1983, the amount of clergy sexual misconduct litigation has risen dramatically, with thousands of lawsuits being reported by the media.[6] Almost certainly, thousands of additional lawsuits will be filed. For every lawsuit filed against one of my clients, I became aware of eight to ten reports of clergy sexual misconduct that did not result in litigation. Generally, these reports did not result in litigation because the victim came forward to the church and the church resolved the complaint satisfactorily. In the wake of the poisonous publicity that churches have received, however, it seems likely that victims will come forward less to churches and more to lawyers—and that will mean that more lawsuits will be filed.

Of course, many instances of clergy sexual misconduct never came to the attention of my clients. Estimates of the number of clergy who have engaged in sexual misconduct vary dramatically, and "there are no reliable studies."[7] I personally have heard estimates ranging from one or two percent to twenty-five percent. No one can say for certain, but ten percent is not inconceivable, if sexual abuse is defined broadly to include not only child abuse, but also sexual relations between "consenting" adults and the less serious conduct that often results in litigation.[8] When I left private practice in 1995, some of my clients already had experienced ten percent of their clergy being accused of sexual misconduct of some kind.

2. Statute of Limitations

Even these numbers do not reflect the true scope of the problem, as they take into account only pastors who are still in active ministry. Churches must defend lawsuits arising out of sexual misconduct that was committed not just by active pastors, but also by pastors who left ministry or even died decades ago.

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[5] *See* Anthony DePalma, *Church Scandal Resurrects Old Hurts in Louisiana Bayou*, N.Y. TIMES, Mar. 19, 2002, at A1.

[6] *See, e.g.*, Laurie Goodstein, *Decades of Damage: Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, at A1.

[7] *Id.*

[8] *See infra* text accompanying note 50. Bear in mind that, in the eyes of the plaintiffs' bar, every "affair" between a pastor and a member of his congregation is abusive (because of a disparity in power). About twenty-five percent of married men engage in at least one extramarital affair. Michael Norman, *Getting Serious About Adultery*, N.Y. TIMES, July 4, 1998, at B7.

Few states still apply a traditional statute of limitations to sexual misconduct lawsuits—that is, a statute that requires someone injured by a wrongful act to sue within a defined period of time measured from the date of the wrongful act. Most states have instead adopted one form or another of a delayed discovery rule, under which the statute of limitations does not begin to run on a victim of sexual misconduct until the victim knows, or reasonably should know, that she has been injured by sexual abuse.[9]

There are variations among delayed discovery statutes, but, at their most liberal, they make it almost impossible for a church to get a lawsuit dismissed under the statute of limitations, no matter how old the misconduct. A statute of limitations defense rarely wins before a jury; the defense must be won at summary judgment or not at all.[10] When the running of a statute of limitations turns largely upon what is in the mind of a victim (as is true under many delayed discovery statutes), it is very difficult to convince judges that there is "no genuine issue as to any material fact"[11] and thus that the church is entitled to summary judgment.

Some states have gone even further. The California legislature amended its statute of limitations to allow anyone who has ever been sexually abused to file suit within one year of January 1, 2003.[12] It makes no difference, under the California statute, whether or when the victim repressed memories of being abused, whether or when the victim knew that the sexual contact that she had experienced was abusive, or whether or when the victim knew that she had been injured by the sexual abuse. Indeed, under radical provisions of the new law, all victims whose prior lawsuits had been dismissed on the basis of the statute of limitations,[13] and some victims who previously settled their claims,[14] are given a second chance to sue.

Defending lawsuits arising out of events that occurred long ago—over sixty years ago, in some cases[15]—is obviously difficult for churches. The pastor accused of the sexual misconduct and the bishop accused of negligence may both be dead, witnesses who could

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[9] *See, e.g.*, 735 ILL. COMP. STAT. 5/13-202.2(b) (2002); MINN. STAT. § 541.073(2)(a) (2003); MO. REV. STAT. § 537.046(2) (2002).

[10] *See* Patrick J. Schiltz, *Defending the Church*, LITIGATION, Spring 2003, at 19, 23–24.

[11] FED. R. CIV. P. 56(c).

[12] *See* CAL. CIV. PROC. CODE § 340.1(c) (West 2003).

[13] *See id.* § 340.1(d)(1).

[14] *See id.* § 340.1(d)(2).

[15] *See 70 More Bring Sexual Abuse Lawsuits in Boston Archdiocese*, N.Y. TIMES, Jan. 30, 2003, at A14.

have testified on behalf of the defendants may have disappeared or died, and documents and physical evidence that could prove the defendants' lack of culpability may have been lost or destroyed. When the case reaches the jury, the jury hears from the victim, who usually gives a tearful account of being abused long ago and attracts understandable sympathy from jurors. In response, the church can offer little or nothing. The church is defenseless—not because it is culpable, but because, whether it is culpable or not, the passage of time has left it unable to defend itself.[16]

3. High and Unpredictable Cost

Clergy sexual misconduct litigation is expensive. Most plaintiffs seek to recover almost entirely for emotional injury—a type of injury that is notoriously difficult to value objectively. What is a lifetime of shame worth? $10,000? $100,000? $1 million? $10 million? It is very difficult to predict how much money a jury will award in an emotional injury case; the only thing that the church knows for certain is that the sky is the limit.

Some plaintiffs also seek punitive damages. There are many problems with awarding punitive damages against churches,[17] two of which deserve mention here.

First, punitive damages often reflect the wealth of the defendant, and the "paper" wealth of churches can be deceptive. It is not uncommon for a diocese that owns, say, a downtown cathedral valued at $100 million to be so cash poor that it is cutting $18,000-per-year custodial positions. The market for cathedrals is rather limited, and many of the other assets of a church are similarly illiquid. As a result, it is easy for juries to "over-punish" churches.

Second, punitive damages, like damages for emotional injury, are almost impossible to value objectively, especially when the defendant is a church. How much in punitive damages should be awarded against a Catholic diocese today to punish it for a decision made thirty years ago by a bishop who is now dead? When one bears in mind that such (uninsurable) damages will have to be paid either by Catholic

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[16] Even in less egregious cases—involving, say, a "he-said she-said" conflict over whether a sexual relationship occurred fifteen years ago—the passage of time makes it extremely difficult for juries to ascertain the truth.

[17] In my view, awarding punitive damages against a church violates the First Amendment. I made this argument—unsuccessfully—on behalf of the Archdiocese of St. Paul and Minneapolis in *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992).

parishioners donating more money or by those served by the diocese receiving fewer services,[18] the impossibility of objective evaluation becomes clear. Those who must pay the punitive damages not only had no control over either the priest who committed the abuse or the bishop who made the abuse possible, but they were usually the very ones put at risk (if they were even alive at the time). To ask a jury how much in punitive damages would appropriately punish the potential *victims* of a priest's or bishop's misconduct—potential victims who had no control over the priest or bishop and no knowledge of their activities—is to ask the nonsensical.

4. Uncertain Insurance Coverage

Many states do not permit insurance against punitive damages as a matter of public policy,[19] and, even where such coverage is permitted, it is usually not sold to churches by insurance companies. Thus, churches almost always find themselves without coverage for punitive damages.

Churches often find themselves without coverage for compensatory damages as well. As noted, many of the lawsuits brought against churches involve sexual misconduct that occurred decades ago. When a church is sued for misconduct that occurred in 1960, it is unlikely that the church will be able to identify the company that insured it at the time. Even if the church can identify the insurer, it likely cannot prove the scope or limits of its coverage. Insurers have been taking a hard line against churches, sometimes insisting that they produce physical copies of their old insurance policies.[20] Few churches can do so with respect to policies that were purchased decades ago. Even when churches locate old insurance policies, they usually find that the limits of coverage are grossly inadequate. A $10,000 liability policy provided ample protection in 1960; it does not in 2003.

Even for more recent incidents, churches often find themselves uninsured. The hundreds of lawsuits that churches have already defended have diminished or exhausted much of their existing insurance coverage. In addition, for the past decade or so, policies that insure churches have excluded coverage for liability arising out of

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[18] *See infra* Part III.A.

[19] *See, e.g.*, PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 657–58 (Cal. 1999); Home Ins. Co. v. Am. Home Prods. Corp., 550 N.E.2d 930, 932 (N.Y. 1990).

[20] *See* Edward Walsh, *Insurance a Worry for Catholic Church*, Wash. Post, July 10, 2002, at A3.

sexual misconduct. A few insurance companies offer "riders" that cover such liability, but that coverage is expensive and is capped at relatively low limits. Yet even when churches purchase this coverage, they find, when they get sued, that their protection sometimes disappears. Insurance companies have been aggressive in exploiting loopholes in their policies. They claim, for example, that they did not receive prompt notice of the claim or that the church, in reaching out to victims of sexual misconduct, violated the cooperation clause of the insurance policy.

As a result of these factors (and others), clergy sexual misconduct lawsuits are extraordinarily dangerous to churches. Churches know that, if sexual misconduct occurs, the resulting lawsuit may be brought long after the church loses the ability to defend itself. Churches also know that even one sexual misconduct lawsuit, no matter when it is brought, may result in uninsured damages so large that the church will be crippled or bankrupt.[21] As a result, churches are extremely sensitive to clergy sexual misconduct lawsuits. Put differently, clergy sexual misconduct litigation—actual and threatened—has a significant impact on the behavior of churches.

B. *The Legal Claims*

In a typical clergy sexual misconduct lawsuit, the plaintiff sues the pastor who committed the abuse, the congregation that employed him, and the religious organization with which the pastor and congregation were affiliated.

For purposes of this Article, the claims typically brought against pastors are the least troublesome. Clergy do not exercise religion when they have sexual contact with children or vulnerable adults. For the state to prohibit such contact—and require a pastor to pay damages to those he has injured—does not generally implicate religious liberty, any more than it implicates religious liberty for the state to prohibit pastors from murder or to require pastors to compensate people whom they injure in automobile accidents.

Most pastors are judgment-proof, though, and most cannot expect an insurer to indemnify them for sexual misconduct. Thus, the real focus of plaintiffs in clergy sexual misconduct litigation is on the

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[21] For an exploration of the legal and moral propriety of a church invoking charitable immunity, where available, to minimize the financial impact of clergy sexual abuse, see generally Catharine Pierce Wells, *Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy*, 44 B.C. L. REV. 1201 (2003).

claims against the broader church. Plaintiffs proceed against the church on both "no-fault" and "fault" theories.

1. "No-fault" Theories

Plaintiffs invariably seek to hold the church vicariously liable. If a plaintiff can prove (a) that the pastor was employed by the church and (b) that he was acting within the scope of that employment in committing the sexual misconduct, then the plaintiff can make the church pay for her damages, whether or not the church was at fault in any way.

Both of these elements are litigated ferociously. Churches, not surprisingly, argue that pastors do not act within the scope of their employment when they sexually exploit children or vulnerable adults. In the view of churches, a pastor commits sexual abuse to further his own personal interests, not the interests of his employer. Plaintiffs disagree. They emphasize that, in committing sexual misconduct, a pastor takes advantage of a position of trust conferred upon him by the church. Courts have issued inconsistent decisions.[22] This issue is largely outside of the control of churches, though, and thus does not have much impact on the way that churches conduct their ministries.

The same cannot be said for the other element that is litigated ferociously. Usually, there is little disagreement that the abusive pastor was employed by his congregation. The parties often disagree, however, about whether the relationship between the pastor and the national or regional organization with which he was affiliated was a principal-agent relationship giving rise to vicarious liability.

Churches organize themselves differently. Some churches—such as the Roman Catholic Church—are so hierarchical that there is no question that priests function as the agents of dioceses. Other churches—such as the Southern Baptist Convention—are so congregational that there is no question that pastors function as the agents only of their congregations. But many large American denominations—for example, the United Methodist Church, the Evangelical Lutheran Church in America, and the Presbyterian Church (U.S.A.)—fall in between these two extremes. Their congregations and pastors have more autonomy than Roman Catholic parishes and

[22] A substantial majority of courts have held, as a matter of law, that a pastor does not act within the scope of his employment when sexually abusing a congregant or counselee. *See* N.H. v. Presbyterian Church (U.S.A.), 998 P.2d 592, 599 & n.30 (Okla. 1999) (collecting cases).

priests, but not as much as Southern Baptist congregations and pastors.[23]

In cases involving these "in between" churches, the agency question is litigated fiercely because the stakes are so high. Establishing an agency relationship gives plaintiffs a chance to recover from the (relatively) deep pocket of the church without having to show that the church did something wrong. Thus, for churches, the question whether all of their pastors are deemed to be their agents has enormous financial consequences.

2. "Fault" Theories

Although attempts to hold churches vicariously liable have implications for religious liberty,[24] those implications pale in comparison to those arising from attempts to hold churches liable for their own negligence. Plaintiffs have pursued several fault-based theories against churches, including negligent ordination, negligent training, negligent hiring, negligent supervision, and negligent retention. Most often, plaintiffs argue that it was negligent for the church to ordain, hire, or retain a pastor after it knew, or should have known, something about the pastor that disqualified him from ministry. Typically, that "something" is sexual misconduct.[25]

Plaintiffs have been pursuing such fault-based theories against churches for at least twenty years. A substantial minority of courts have rejected these claims on First Amendment grounds, holding, in essence, that a court is barred by the First Amendment from interfering in the ordaining, training, hiring, supervising, or retaining of clergy.[26] A majority of courts have found no constitutional bar.[27]

Putting aside the merits of the constitutional questions, the fact that most courts are willing to assess the reasonableness of a decision by a church as to whom will serve in its ministry—as to whom will teach and preach in its name—has obvious implications for religious liberty. It could be that the courts are acting constitutionally. And it could be that such interference in religious freedom is the lesser of

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[23] *See* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 420–22 (2002).

[24] *See infra* Part III.E.

[25] For an examination of the possibility of dioceses and bishops being found criminally negligent for sexual misconduct of individual priests, see generally John S. Baker, Jr., *Prosecuting Dioceses and Bishops*, 44 B.C. L. REV. 1061 (2003).

[26] *See* Malicki v. Doe, 814 So.2d 347, 358 & n.10 (Fla. 2002) (collecting cases).

[27] *See id.* at 351 & n.2 (collecting cases).

two evils—the other evil being failing to compensate victims of clergy sexual misconduct. As I will describe,[28] though, it is clear that litigation over these claims has substantially burdened the religious liberty of churches and those who belong to them.

Before addressing this point further, I want to identify three recent developments that make fault-based litigation against churches even more troubling.

First, the "trigger" has been changing. Negligent ordination, employment, supervision, and retention claims are based upon an argument that the church knew, or should have known, of something bad about the pastor—something that disqualified him from ministry. When I began litigating these claims in 1987, large verdicts or settlements were nonexistent unless there was evidence that, prior to the time the plaintiff was abused, the church knew of sexual misconduct by the pastor. That is changing. Churches are now paying large verdicts and settlements in cases in which the church knew of no prior sexual misconduct by the pastor—indeed, in cases in which there *was* no prior sexual misconduct by the pastor—but the church knew of certain "'attribute[s] of character'"[29] that purportedly rendered the pastor unfit for ministry. In one case that resulted in a jury verdict of over $1 million, those "attributes" included depression, low self-esteem, problems with authority, and a "sort of struggle in the area of sexual identity."[30] In another case—a case in which the jury awarded compensatory and *punitive* damages totaling almost $700,000—those "attributes" included the fact that the pastor had a drinking problem and had been through a nasty divorce many years earlier.[31]

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[28] *See infra* Part III.

[29] Moses v. Diocese of Colo., 863 P.2d 310, 327 (Colo. 1993) (en banc) (quoting Connes v. Molalla Transp. Sys., Inc., 831 P.2d 1316, 1321 (Colo. 1992) (en banc)).

[30] *Id.* at 313, 328 & n.23, 329.

[31] The case was *Klein v. Rocky Mountain Conference of the United Methodist Church*, No. 94CV0521 (Colo. Dist. Ct. Nov. 4, 1994). My firm represented the congregation, which settled relatively early. The large verdict was entered against the Conference. Although the case did not result in a published decision, a separate lawsuit brought against Klein by the Conference's insurer is reported as *Church Mut. Ins. Co. v. Klein*, 940 P.2d 1001 (Colo. Ct. App. 1996).

I should note that arguments such as those made in the *Moses* and *Klein* cases are grounded on a logical fallacy. The argument of plaintiffs' attorneys takes the following form: "Of all of the pastors who commit sexual misconduct, *x* percent have struggled with depression." The more telling measure is different: "Of all of the pastors who struggle with depression, *x* percent have committed sexual misconduct." Suppose, for example, that a church had 1,000 pastors, of whom 500 struggled with depression. Suppose further that only five of those 500 pastors committed sexual misconduct. The fact that only one percent of those who struggled with depression committed sexual misconduct is far more

Second, plaintiffs have increasingly pursued breach of fiduciary duty claims against pastors and churches. The court is asked to decide whether the pastor or bishop created a fiduciary duty to the plaintiff—and, if so, whether that duty was breached. Determining whether a pastor or bishop breached such a duty does not involve an inquiry into whether he acted as a *reasonable* minister, some courts explain, but instead requires that the court ask whether the pastor or bishop acted "with utmost good faith and solely for the benefit of the [victim]."[32]

The use of fiduciary theory against churches is a complicated issue—worthy of a separate article[33]—but it has already resulted in a couple of troubling developments. First, although fiduciary law is intended to address duties in confidential, one-on-one relationships (such as parent-child or doctor-patient), at least one court has found that a Catholic diocese and a Catholic parishioner were in a fiduciary relationship—that is, "a relationship . . . 'characterized by a unique degree of trust and confidence between [each other]'"[34]—even though the diocese was not even aware of the existence of the parishioner and the two had no contact with each other.[35] This standard imposes upon church officials affirmative obligations toward people whom they have never met and requires church officials to act "solely for the benefit" of people who have sharply conflicting interests—such as, for example, a priest who commits sexual misconduct and a child he abuses, both of whom, under this boundless interpretation of fiduciary law, are in a fiduciary relationship with the diocese. Second, under fiduciary law, courts have purported to assess what acts of *ministry* are or are not in the best interests of a congregant—an inquiry rife

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significant than the fact that 100 percent of those who committed sexual misconduct had struggled with depression. It indicates, most importantly, that those with depression are not at high risk of committing sexual misconduct. This simple point has been lost on many plaintiffs' attorneys, judges, and jurors. *See, e.g.*, *Moses*, 863 P.2d at 328.

[32] *Moses*, 863 P.2d at 323 (citation and internal quotation omitted); *see also* Doe v. Hartz, 52 F. Supp. 2d 1027, 1061 (N.D. Iowa 1999); F.G. v. MacDonell, 696 A.2d 697, 702–04 (N.J. 1997).

[33] *See generally* John H. Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. REV. 1167 (2003).

[34] Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 429 (2d Cir. 1999) (quoting Dunham v. Dunham, 528 A.2d 1123, 1133 (Conn. 1987)).

[35] *See id.* at 428–30. The court upheld the substance of an award of $250,000 in *punitive* damages against the diocese for breach of that fiduciary duty in connection with sexual misconduct that had occurred thirty years earlier. *Id.* at 413, 428–30. The award was subject to retrial on a statute of limitations issue. *Id.* at 428, 432.

with First Amendment implications.[36] Again, my concern here is not primarily with courts reaching the conclusion that a pastor acts wrongly when he sexually exploits a congregant (although a court does not need to use fiduciary law to do that). Rather, my concern is with courts second-guessing the decisions made by bishops and others in authority within a church.[37]

The final major development is that plaintiffs increasingly have sued bishops—not (or not just) for damages caused by the pastor's sexual abuse—but for damages allegedly caused by the bishop in his handling of the plaintiff's *complaint* of abuse. The plaintiff argues that, when she came forward to tell the bishop that she was abused by the pastor, the bishop and she entered into a fiduciary relationship. When the bishop did something that she did not like—for example, did not offer her money or enough money, or did not refer her to a counselor or to the right counselor—the bishop breached his fiduciary duty.[38] To my knowledge, plaintiffs have had regular success under this theory only in Colorado, thanks to the egregious decision of the Colorado Supreme Court in *Moses v. Diocese of Colorado*.[39] In the current climate, however, I expect these claims to be pursued with vigor in other states.

III. The Impact

The clergy sexual misconduct lawsuits that have been and will continue to be filed against churches cannot help but change churches profoundly, given the large number of such lawsuits, their potential for enormous (uninsured) verdicts, and the nature of the claims being pursued.

In at least one important way, clergy sexual misconduct litigation has changed churches for the better. Churches are now safer places. Churches got sued a lot in the late 1980s and early 1990s, and, in response, they took a number of measures.[40] They adopted sexual mis-

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[36] *See infra* Part III.C.

[37] Most courts have rejected claims of breach of fiduciary duty asserted in clergy sexual misconduct cases, either on state law or First Amendment grounds. *See, e.g.*, Dausch v. Rykse, 52 F.3d 1425, 1438–39 (7th Cir. 1994); Schmidt v. Bishop, 779 F. Supp. 321, 325–26 (S.D.N.Y. 1991); Kelsey v. Ray, 719 A.2d 1248, 1251 (D.C. 1998); Teadt v. Lutheran Church Mo. Synod, 603 N.W.2d 816, 822–23 (Mich. Ct. App. 1999).

[38] *See, e.g.*, *Hartz*, 52 F. Supp. 2d at 1058; Brown v. Pearson, 483 S.E.2d 477, 484–85 (S.C. Ct. App. 1997).

[39] 863 P.2d at 322–23.

[40] Most recently, in November 2002, the U.S. Conference of Catholic Bishops approved the *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual*

conduct policies; they removed hundreds of pastors from active ministry; they improved seminary screening and training; they treated victims with care and compassion; they cumulatively paid millions of dollars to victims who either did not or could not sue; they created "hotlines" and other reporting mechanisms; and they produced educational materials for parishes and congregations. As a result, by the late 1990s, the number of complaints of sexual misconduct that churches were receiving—and the number of sexual misconduct lawsuits that were being filed against churches—had fallen dramatically. Almost surely, this was because the amount of *misconduct* had fallen dramatically.[41] There is a reason why the recent publicity surrounding clergy sexual misconduct has focused almost entirely on misconduct that occurred ten or more years ago—there simply is not much recent abuse to report.[42]

Abuse of Minors by Priest or Deacons ("*Norms*") in response to allegations of clergy sexual abuse. For a critical examination of these *Norms* from a canon law perspective, see generally Ladislas Orsy, S.J., *Bishops' Norms: Commentary and Evaluation*, 44 B.C. L. REV. 999 (2003).

[41] The plaintiffs' bar and others have argued that the dearth of reports of recent sexual misconduct does not reflect a reduction in misconduct, but instead the fact that it sometimes takes victims many years to report misconduct. They are almost certainly wrong. First, victims are different. Some report sexual misconduct right away; some wait for years. When I practiced law, I worked on hundreds of cases involving sexual misconduct that had been reported promptly. If misconduct is continuing unabated, then *some* recent misconduct should be getting reported. Second, the climate for victims today is dramatically different from the climate of ten years ago. Victims are believed today, and much support is available to them. It is easier, not harder, for victims to report. Third, one reason why pastors could abuse dozens of people in the past is that those who had evidence of such abuse—such as congregants or victims' parents—simply could not believe that a pastor was capable of such conduct. No one is laboring under that illusion today, and congregants and parents are, if anything, hyper-alert to indications that their pastor is committing sexual misconduct. Finally, if the explanation of the plaintiffs' bar is to be believed, then none of the steps taken by churches in the past decade—for example, removing from ministry hundreds of pastors who have committed sexual misconduct—has made churches any safer. Such a claim is absurd.

[42] *See, e.g.*, MASS. OFFICE OF THE ATTORNEY GEN., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON: A REPORT BY THE ATTORNEY GENERAL 15 (2003), *available at* http://www.ago.state.ma.us/archdiocese.pdf (reporting that exhaustive investigation of the Archdiocese of Boston "did not produce evidence of recent or ongoing sexual abuse of children by priests or other Archdiocese workers"); Goodstein, *supra* note 6, at A1 (discussing a large-scale study of allegations of sexual misconduct made by 4,268 people against 1,205 priests that indicated that "[m]ost of the abuse occurred in the 1970's and 1980's" and "[t]he number of priests accused of abuse declined sharply by the 1990's"); Gregory A. Hall et al., *Church in Crisis*, COURIER-JOURNAL (Louisville, Ky.), Sept. 29, 2002, at 1X (providing analysis of 185 lawsuits against Archdiocese of Louisville and reporting that only twenty plaintiffs alleged sexual misconduct after 1985 and only one after 1990).

Although churches today are safer—and although the plaintiffs' bar and victims' advocacy groups deserve a great deal of credit for that fact—tort litigation will have other, less salutary effects on churches. Among the most troubling of those effects are the following:

A. *Monetary Impact*

Clergy sexual misconduct lawsuits result in the transfer of hundreds of millions of dollars from churches to plaintiffs, plaintiffs' attorneys, defense attorneys, expert witnesses, and others. This not only harms churches, but harms society.

Churches are required, by law, to devote their resources "exclusively [to] religious, charitable, . . . or educational purposes."[43] Part of the reason why churches receive constitutional protection, and part of the reason why they are exempt from taxation, is that, broadly speaking, churches promote the public welfare.[44] They not only facilitate the exercise of religion in its narrowest sense—by, for example, organizing worship services—but they provide food, clothing, shelter, education, health care, and other assistance to millions of the most vulnerable people in the world.

A large and growing percentage of the clergy sexual misconduct litigation brought against churches is not covered by insurance.[45] Churches have only two ways to pay the costs of such litigation—churches can ask the people in the pews to donate more money, or churches can reduce the services that they provide.

The people in the pews do not seem anxious to increase their donations to help pay the costs of litigation. Although there is little evidence that the negative publicity surrounding clergy sexual misconduct has substantially reduced the income of churches,[46] there is certainly no evidence that giving has *increased* as a result of the scandal.

Because it is not realistic to expect donations to increase, churches have no alternative but to pay for litigation by cutting back on the services they provide. Sometimes these cutbacks can be relatively painless. For example, if a church sells a vacant building that it

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[43] I.R.C. § 501(c)(3) (2000).

[44] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 12 (1989); Walz v. Tax Comm'n, 397 U.S. 664, 672–73 (1970).

[45] *See supra* Part II.A.4.

[46] *See* John Rivera, *Despite Scandal, Catholics Give More*, BALT. SUN, Feb. 7, 2003, at 1A.

has been holding for investment purposes or for unspecified future ministries, the impact on those served by the church is unlikely to be severe. But other cutbacks—such as closing churches, schools, or shelters—can be quite painful. Again, the impact of such cutbacks falls on people who not only had no control over the abusive pastor or negligent bishop, but who often were themselves put at risk.

In my view, churches have a moral obligation to assist those harmed by clergy sexual misconduct. The claim on the church's resources made by someone injured by such misconduct will generally be morally superior to the claim on those resources made by, for example, a student at an inner-city parochial school or a homeless person who resides at a church-operated shelter. But as the amount demanded by a victim increases—as the issue shifts from whether the victim deserves *any* compensation to whether the victim deserves $300,000 instead of $250,000—the "marginal" moral force of the victim's claim diminishes. When the discussion shifts to punitive damages—damages that, in the church context, almost always punish people who are both blameless and powerless—it is very difficult to conclude that a victim's claim to that windfall is morally superior to the claims of other people served by churches.

Putting aside the issue of what victims deserve, there is an additional problem. The tort system is a terribly inefficient way to compensate those injured by clergy sexual misconduct (or, for that matter, those injured in any other way). It is common for a clergy sexual misconduct case that results in, say, a $100,000 verdict or settlement to cost the defendants—pastor, congregation, and broader church—$200,000 or more in defense costs. The net result is that $300,000 is taken away from the ministries of the church in order to put about $250,000 into the pockets of lawyers and about $50,000 into the pocket of the victim.[47]

B. *Impact on the Character of the Ordained Ministry*

Perhaps nothing is more important to a church than the identity of those who exercise ordained ministry. Because "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose," the freedom of a church to be able to choose who will teach and

[47] A victim's attorney will typically take between a third and a half of her recovery, and the victim will also have to pay expert witness fees and other expenses.

preach in its name is its very "lifeblood."[48] This is true in at least a couple of broad respects.

First, what a church *believes* is inseparable from the identity of its members—and, in particular, the identity of its leaders. The founders of the world's great religions often did not speak with clarity on the most fundamental issues of our time. Those who share the same faith can have radically different views about such issues as abortion, capital punishment, euthanasia, immigration, taxes, social welfare, and war. The view of any particular denomination will to a great extent reflect the views of those who exercise ministry within it.

Second, what a church *does* is similarly inseparable from the identity of its leaders. Two congregations within the same denomination may have very different ministries—one might be focused on worship and study, the other on social justice and activism—largely because of differences between their pastors. Worship services—the locus of most of the contact between a typical congregant and a typical pastor—may differ dramatically, even within the same denomination, because of differences among pastors. The experience of a congregant who seeks out a pastor for aid, comfort, or advice will vary greatly depending upon the pastor she consults. In short, the question of who exercises ministry within a church is a question with profound religious implications.

Recognizing this fact, legislatures and courts have historically given churches almost complete freedom to select their pastors.[49] Clergy sexual misconduct litigation, however, is changing that by attaching enormous—potentially catastrophic—consequences to the decision of a church to ordain, employ, or retain a certain "type" of person as its minister.

What "type" of person? The most obvious are the Gilbert Gauthes—the pastors who have sexually abused many children and whose crimes are known to their churches. If it were only the Gilbert Gauthes who were foreclosed from exercising ministry, few would shed a tear. But the Gilbert Gauthes are involved in only a tiny minority of clergy sexual misconduct lawsuits (although they get almost all of the media attention). In the majority of cases, the conduct of the pastor was much less serious, and the facts known to the church much more ambiguous.

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[48] McClure v. Salvation Army, 460 F.2d 553, 558–59 (5th Cir. 1972).

[49] *See* Patrick J. Schiltz & Douglas Laycock, *Employment in Religious Organizations*, *in* THE STRUCTURE OF AMERICAN CHURCHES: AN INQUIRY INTO THE IMPACT OF LEGAL STRUCTURES ON RELIGIOUS FREEDOM (forthcoming 2004).

In the 500-plus cases on which I worked, pastors were accused of a breathtaking array of misconduct. By far, the most common allegation was that the pastor had engaged in a sexual relationship with an adult congregant—a relationship that appeared to be consensual but was alleged to be abusive because of the disparity in power between the pastor and the congregant. Other common allegations were that the pastor had verbally propositioned the plaintiff, exposed himself to her, used sexual language that made her feel uncomfortable, induced her to reveal details of her sexual history, brushed up against her, kissed her on the mouth, delivered "lingering hugs," or bought her flowers. In one case in which I was not involved, "an unsolicited kiss and a rub on the back" resulted in a thirteen-count complaint, several years of litigation, and, among other things, a forty-five page federal district court opinion.[50]

Similarly, the alleged negligence on the part of the broader church varied dramatically. In the overwhelming majority of my cases, there was no evidence that the church knew of prior sexual misconduct by the pastor. In those cases, the plaintiff argued that the church *should* have known that the pastor had committed or was likely to commit sexual misconduct. Sometimes the plaintiff argued that the church should have been "tipped off" by less serious *sexual* misconduct, such as the fact that the pastor told dirty jokes, leered at young women, or looked at pornography. On other occasions, the plaintiffs argued that it was *nonsexual* conduct that should have put the church on notice, such as the fact that the pastor had suffered from depression or alcoholism or had recently suffered a significant loss in his life.[51]

It is impossible for bishops to supervise pastors closely, both because of the nature of churches and because of the nature of ministry. A typical bishop may have responsibility for hundreds of pastors scattered over thousands of square miles. Most bishops have small staffs and are themselves quite busy. They have little time to be "in the field" supervising pastors—and, even if they had more time, they

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[50] Doe v. Hartz, 52 F. Supp. 2d 1027, 1034–35 (N.D. Iowa 1999). In *Hartz*, the court refused to dismiss a claim that the priest had later committed an "assault" against the plaintiff by shaking her hand "during the 'sign of peace' in the mass." *Id.* at 1066–67.

[51] It is only a matter of time before a plaintiff will allege that a church's knowledge that a pastor was himself a victim of sexual abuse should have put the church on notice that the pastor was at high risk of abusing others. *See* Broderick v. King's Way Assembly of God Church, 808 P.2d 1211, 1220–21 (Alaska 1991). Seventy percent of priests who sexually abuse minors were themselves abused as children. *See* Marianne Szegedy-Maszak et al., *Chastity and Lust*, U.S. NEWS & WORLD REP., Apr. 1, 2002, at 54.

could, at most, spend a few hours with each pastor. Pastors who have no difficulty hiding their sexual misconduct from their families and congregants—people who spend hundreds of hours with them each year—obviously will have little difficulty hiding their sexual misconduct from their bishops. Moreover, even if every bishop were responsible for supervising only *one* pastor, the bishop would still have difficulty monitoring the day-to-day work of that pastor. Much of what pastors do is necessarily done in private—in their offices, in the homes of congregants, at hospital bedsides. Indeed, pastors are often required by law to maintain the confidentiality of much of what they do.[52]

Because it is impossible for bishops to supervise pastors closely, a bishop is faced with a difficult choice when he receives troubling information about a pastor—such as a report that the pastor engaged in an extramarital sexual relationship or was hospitalized for depression. The bishop can remove the pastor from active ministry, or the bishop can leave the pastor in active ministry, knowing that, if the pastor commits sexual misconduct in the future, the bishop may be found negligent and his church ruined.

This is no small problem. Those in ministry suffer from depression, alcoholism, and similar maladies at least as often as members of the general public.[53] Moreover, the ministry continues to be a male-dominated profession, and there is no reason to believe that male pastors are any less likely than other men to engage in such common behavior as viewing pornography or becoming involved in an extramarital sexual relationship.[54] In other words, it seems likely that a *ma-*

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[52] *See, e.g.*, GA. CODE ANN. § 24-9-22 (2003); MASS. GEN. LAWS ch. 233, § 20A (2000); MICH. COMP. LAWS § 600.2156 (2000); N.Y. C.P.L.R. 4505 (McKinney 1992).

[53] EVANGELICAL LUTHERAN CHURCH IN AMERICA, MINISTERIAL HEALTH AND WELLNESS REPORT, 2002, at 21 (2002) ("During a one-year period, 6% of U.S. men and 12% of women suffer from depression, while 16% of male clergy and 24% of female clergy complained of problems with depression."); Goodstein, *supra* note 6, at A1 (discussing a psychological study that "found that 57 percent of [Roman Catholic] priests were psychologically 'underdeveloped'"); Thomas Maeder, *Wounded Healers*, ATLANTIC MONTHLY, Jan. 1989, at 41 ("[S]tudies of the clergy . . . suggest a high incidence of family problems and narcissistic disorders, and a host of other problems involving interpersonal relations and self-esteem."); Ernest Tucker, *Deliverance from Temptation*, CHI. SUN-TIMES, Aug. 22, 1999, at 22 ("[A] 1995 study at Georgetown University of members of religious orders estimated that 11 percent of the priests and 5 percent of the nuns had problems with alcoholism . . . .").

[54] For statistics regarding the extent of infidelity among married men, see Norman, *supra* note 8. For statistics on the size and scope of the pornography industry, see Timothy Egan, *Technology Sent Wall Street into Market for Pornography*, N.Y. TIMES, Oct. 23, 2000, at A1. For statistics on the same topic, as well as on the involvement of clergy in extramarital sex-

jority of those in ministry have *something* in their past that could later be cited by a plaintiff's attorney as evidence that they were at risk of engaging in sexual misconduct.

Bishops vary substantially in the degree of legal risk that they are willing to accept. Even the least risk-adverse bishops, though, are going to remove from active ministry many men and women in addition to the Gilbert Gauthes. The result will be a changed ministry—a ministry disproportionately composed of people who have not struggled with serious problems (such as depression or addiction), who have not suffered grievous losses (such as the death of a loved one), and who have not made serious mistakes (such as committing adultery). The only "flawed" people who will remain in ministry are those who have successfully hidden their problems from others—that is, those who have received the *least* help for their problems.

Increasingly, then, the ministry will become less representative of the people it serves. This cannot help but significantly affect the development of religious thought. Consider that Saint Augustine, perhaps the most influential Christian thinker in history after Saint Paul, would not be ordained by many American churches today because of the life he led before his conversion to Christianity.[55] Or consider that Martin Luther King, Jr., perhaps the most influential religious leader of the twentieth century, would be removed from ministry by many bishops today if his extramarital sexual conduct became known.[56] Likewise, removing "flawed" people from ministry will also hamper the ability of pastors to help hurting people—people who are hurting because they are suffering from precisely the kinds of problems that those in ministry are no longer safely "allowed" to have.

C. *Impact on the Bishop's and Pastor's Relationships with Congregants*

Clergy sexual misconduct litigation has already had an impact on the relationship between pastors and congregants. Many pastors have altered the way that they relate to congregants so as to protect against false allegations of sexual misconduct. Many pastors will no longer meet with congregants in private homes, no longer engage in one-on-one discussions with congregants in their offices (unless it is during

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ual contact and pornography, see Prodigals International, *Stats and Facts About Sexual Addiction*, *at* http://www.iprodigals.com/dox/prg.htm (last visited Oct. 2, 2003).

[55] *See* SAINT AUGUSTINE, CONFESSIONS 24–29, 37–38, 109 (Henry Chadwick trans., Oxford University Press 1991).

[56] *See* DAVID J. GARROW, THE FBI AND MARTIN LUTHER KING, JR. 156, 159, 162 (1981).

office hours, staff are present, and the door is open), and no longer participate in the type of youth activities that in the past led to friendships between pastors and young people and inspired many young people to pursue ordained ministry themselves.

If courts follow the lead of *Moses v. Diocese of Colorado* and impose fiduciary obligations on those in ministry, both bishops and pastors will have an incentive to keep congregants at arm's length. Bear in mind that, in *Moses*, the plaintiff was awarded over $700,000 for the injuries that she had suffered—not on account of being sexually abused—but on account of such things as the bishop failing "to assist [her] in understanding that she was not the only person responsible for her sexual relationship."[57] I defended one bishop from a *Moses* claim alleging that he had breached his fiduciary duty to a victim by advising her to disclose that she had been sexually exploited by her pastor (this allegedly subjected her to blame and retaliation), while I was simultaneously defending another bishop from a *Moses* claim alleging that he had breached his fiduciary duty to a victim by advising her *not* to disclose that she had been sexually exploited by her pastor (this allegedly forced her to "suffer in silence"). I defended a couple of bishops from *Moses* claims alleging that they had breached their fiduciary duties by expressing their honest opinion to an adult victim that she bore some moral responsibility for a long-term sexual relationship with her pastor. Such claims should hardly be surprising, given that, in *Moses* itself, one of the plaintiff's expert witnesses told the jury that the bishop had breached his fiduciary obligation by hearing the victim's confession and granting her absolution. (This, the expert said, wrongly implied to the victim that she had done something wrong.)[58]

If providing pastoral care to a person creates a fiduciary relationship, and if creating such a relationship leaves open every aspect of one's ministry to judicial second-guessing (and potential six- and

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[57] 863 P.2d 310, 323 (Colo. 1993).

[58] *See* Appellants' Opening Brief at 16 n.7, *Moses*, 863 P.2d 310 (No. 91 CA 2069). In *Klein v. Rocky Mountain Conference of the United Methodist Church*, a Methodist bishop was ordered to pay $350,000 in compensatory and $247,500 in *punitive* damages to a plaintiff for damages caused by the bishop's allegedly insensitive handling of the complaint of sexual misconduct. *See* No. 94CV0521 (Colo. Dist. Ct. Nov. 4, 1994). Among other things, the bishop was accused of not making sufficient counseling available to the plaintiff and not adequately preparing an interim pastor to provide pastoral care to her. In both *Moses* and *Klein*, then, bishops were forced to pay enormous damages because a jury disapproved of the way that they had provided pastoral care—an act of *ministry*—to a victim of sexual misconduct.

seven-figure verdicts), then many pastors will decide that providing such care is not worth the risks. They will devote their energies to worship services and other group activities, leaving victims of sexual abuse and others who seek care and comfort to look elsewhere.

D. *Impact on the Relationship Between Bishop and Pastor*

Clergy sexual misconduct litigation has forever changed the relationship between pastors and their ecclesiastical superiors. Historically, that relationship was often one of support. A bishop functioned as the "pastor to the pastors." The bishop was the first person—sometimes the only person—to whom a pastor would turn when *he* needed pastoral care.

The bishop is now the last person to whom a pastor would want to turn for help. If a bishop learns from a pastor that he has engaged in sexual misconduct of some kind—or that he is suffering from some serious problem that might cause him to "drop his guard a little"[59]—the bishop may end that pastor's ministry rather than risk ruinous litigation.[60] Moreover, if some state legislators have their way, the bishop may have to report the pastor to law enforcement officers, even if the pastor was speaking to him in confidence—indeed, even if the pastor was speaking within the confines of the "priest-penitent" privilege.[61]

It is difficult to understand how these changes will help anyone. In countless cases in which I was involved, a bishop was able to help a pastor—by, for example, arranging for the pastor to receive medical or psychological help—before that pastor committed sexual misconduct (or additional sexual misconduct) or otherwise acted to harm others or himself. Depriving troubled pastors of the one "safe" place that many of them have to seek help with their problems seems likely to result in *more* harmful conduct and *more* victims.

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[59] *See* Appellee's Answer Brief at 6, *Moses*, 863 P.2d 310 (No. 91 CA 2069).

[60] For a examination of how canon law provides means for a bishop to discipline a priest who commits sexual abuse, see generally John J. Coughlin, O.F.M., *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, 44 B.C. L. REV. 977 (2003).

[61] *See* Jo Becker & Caryle Murphy, *McCarrick Decries Md. Child Abuse Bill*, WASH. POST, Feb. 22, 2003, at B1 ("[L]awmakers in Kentucky and New Hampshire want to eliminate the priest-penitent privilege altogether . . . ."). Texas already requires clergy to report information about child sexual abuse, even when that information is provided during confession. *See* TEX. FAM. CODE ANN. § 261.101(c) (Vernon 2002). For a survey and analysis of priest-penitent privileges and child abuse reporting statutes in the fifty states, see generally Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. REV. 1127 (2003).

E. *Impact on the Relationship Between the Broader Church and Congregations*

The changes described above will result from the desire of churches to avoid being found negligent in a sexual misconduct case, but churches are also likely to take steps to avoid vicarious liability. Churches can do nothing to affect whether the courts of a particular state will hold that a pastor who commits sexual misconduct acts within the scope of his agency, but churches can take steps to minimize the chances that they will be found to be in a principal-agent relationship with the pastor. This is especially true for the regional and national expressions of a church, which often do not directly employ the pastors who serve in congregations.[62]

A church that has only limited control over its congregations and pastors has two options for avoiding vicarious liability. The first is to relinquish the limited control it has—viz., to create more distance between itself and its pastors and congregations. The less authority that a church exercises over a pastor or the congregation that employs him, the less chance that the church will be held vicariously liable for the pastor's misconduct. The second is to *increase* its control over congregations and pastors. Such increased control will make it more likely that the pastor will be regarded as the agent of the church, but it will give the church more power to prevent sexual misconduct from occurring in the first place.[63]

Whether a church chooses to make itself more or less hierarchical, the ministry of the church will be affected. Moreover, the church will be deciding how to structure itself—how its constituent elements will relate to one another—not based upon its understanding of God's will or its beliefs about how ministry can most effectively be conducted, but rather to avoid being ruined by a clergy sexual misconduct lawsuit. Matters of structure are critically important; they were near the heart of the Reformation. A Protestant need only consider her likely reaction if her church decided to elect a Pope, and a Catholic her likely reaction if her church decided to dispense with the Papacy, to understand why structure matters.

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[62] For an examination of factors determining whether religious entities are proper defendants in clergy sexual abuse cases, see generally Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089 (2003).

[63] *See* MCCONNELL ET AL., *supra* note 23, at 422 ("The rules about ascending liability for torts . . . push churches toward the extremes of hierarchicalism and congregationalism, and away from moderate or mixed forms of polity.").

F. *Impact on the Character of Organized Religion*

Religion receives constitutional protection in part because it acts as a counterbalance to the state.[64] Stephen L. Carter and others have argued that religion should be protected because it serves as an "external moral critic and alternative source of values and meaning."[65] Because religion is, at bottom, a "group search for sense and value" that is "focus[ed] on the ultimate," Carter contends that religion is "more likely than other competing sources of authority" to challenge the state's "imposed" meanings and thereby to serve as a bulwark against tyranny.[66]

Religion is a matter of faith, not reason, and thus many religious beliefs and practices are "unreasonable." Indeed, churches are sometimes at their best when they are at their most "unreasonable." "Unreasonable" religious leaders were at the forefront of efforts to abolish slavery in the nineteenth century and fight racial discrimination in the twentieth century. Those efforts drew considerable ire—and, in the case of religious leaders like Martin Luther King, Jr.—assassins' bullets. But America would be a much worse place today if these religious leaders had been forced to act more "reasonably."

One reason why clergy sexual misconduct litigation is troubling—one reason why it burdens religious liberty—is that it gives hundreds of juries around the United States almost complete freedom to act against churches out of religious animus, even when that animus has nothing to do with the evidence in the case. As described above,[67] jurors in sexual misconduct cases are invited to award damages for purely emotional injuries—and, in some cases, to punish churches for reckless or intentional wrongdoing. Jurors have virtually unbounded discretion in making these decisions. No objective standard guides jurors in deciding how much a plaintiff should be compensated for "shame" or "low self-esteem" nor in deciding how much parishioners should be "punished" for decisions that they did not

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[64] For an exploration of the limits of this constitutional protection in the context of clergy sexual abuse, see generally Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031 (2003).

[65] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 273 (1993).

[66] *Id.*

[67] *See supra* Part II.A.3.

make. Jurors are free to "pick a number," with little or no effective judicial oversight.[68]

Almost every clergy sexual misconduct lawsuit presents an opportunity for a jury to cripple a church financially—if not a national church, then at least a congregation or judicatory. Churches cannot help but be chilled by this threat. I recently asked a bishop why he had been so quiet regarding an issue of public importance on which both he and his church had been outspoken in the past. "With all of this litigation," he answered, "we're just hunkering down in our foxholes, trying to keep our heads from getting blown off." What the bishop was saying was that, with the financial survival of his church likely to be in the hands of various judges and jurors in the near future, he was not going to do anything to create anger toward himself or his church.

I worry that, with the gun of clergy sexual misconduct litigation pointed at their heads, churches may stop acting like churches. Like all earthly institutions, churches are deeply flawed, and some church leaders have made horrendous mistakes. Over the centuries, though, churches have been a force for incalculable good. Today churches provide food to millions who are hungry, clothing to millions who are naked, shelter to millions who are homeless, education to millions who are uneducated, medical care to millions who are sick, and comfort to millions who are dying. Moreover, on so many issues—economic justice, racial discrimination, the treatment of undocumented aliens, the death penalty, society's obligations to the mentally or physically disabled, terrorism, and war—the prophetic voices of churches have never been needed more.

Clergy sexual misconduct victims have suffered a grievous wrong, and it is understandable why legislators and courts have felt compelled to find ways to compensate them. Clergy sexual misconduct *litigation*, however, has the potential to create a new class of victims, much larger than those now involved in suing churches. The challenge for society—and particularly for churches—is to devise a means

[68] Much the same could be said of any case in which jurors are asked to award damages for emotional injury or punitive damages, even when the defendant is, say, the local Wal-Mart store. The difference is that the First Amendment protects churches; it does not protect Wal-Mart. Wal-Mart has not been the subject of bigotry and persecution for at least two thousand years, nor has Wal-Mart been deemed so valuable to society, and so vulnerable to persecution, that it is protected by a constitutional amendment.

of fairly compensating victims with as little harm to religious liberty as possible.[69]

[69] I have described one possible means of meeting this challenge. *See* Patrick J. Schiltz, *The Future of Sexual Abuse Litigation*, AMERICA, July 7–14, 2003, at 8, 10–11.